Sunday, August 9, 1987

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

THOMAS R. WICKEN and CAROL J. WICKEN, No. 1-83-01325

Debtors.

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CHARLES DUCK, Trustee,

Plaintiff,

v. A.P. No. 1-86-00139

GORDON MILLAR and EUGENIA MILLAR,

Defendants.

_____/

The facts in this matter have been stipulated to and therefore need not be repeated here. The court cannot help but marvel, however, that anyone would be so foolish as to purchase a home subject to a deed of trust without determining when the note it secures becomes all

due and payable. In essence, the Millars agreed to make payments to the debtors and the debtors agreed to make the payments on the Millars' first mortgage held by Naimo. When the debtors defaulted on their obligation, the Millars unilaterally decided to set off their payment in full of the Naimo note against their obligation to the debtors, and stopped paying on the debtors' note altogether. In their briefs, both parties miss the mark by arguing about section 553 of the Bankruptcy Code. The Trustee argues that the debts were not mutual because the debtors' breach was post-petition. However, it is clear that both obligations were created prepetition and both breaches occurred postpetition, so that setoff is proper. It is therefore not necessary to discuss the Millars' recoupment argument. The relevant law here is section 362. The Millars' error was not not in claiming a right to equitable treatment, but rather in assuming that they could achieve their view of equity unilaterally instead of placing the matter before the court. Section 362(a)(6) prohibits any act to collect a claim which arose prepetition; section 362(a)(7) prohibits setoff of a debt owing to the debtor prepetition against any claim, prepetition or postpetition. The purpose of these laws is to maintain the status quo until the court can determine what is equitable. For this reason, the term "setoff" in section 362(a)(7) is to be interpreted generally, as including "recoupment." In re Lee (Bkrtcy.E.D.Pa.1982) 25 B.R. 135, 137. The conduct need only be "tantamount" to setoff. In re Executive Associates, Inc. (Bkrtcy.S.D.Tex.1982) 24 B.R. 171. In this case, it is not equitable to allow the Millars to stop all payments on the estate's note. Rather, they should be allowed to deduct the amount they paid on the Naimo note from the principal balance owing on the estate's note, and their monthly payments to the Trustee should be reduced by their monthly payments on their new financing attributable to the amount needed to pay off the Naimo note. This is the relief the Millars would have obtained, had they asked for it. To the extent the Millars have setoff or recouped more than this, they have unjustly enriched themselves at the estate's expense, and the estate is entitled to immediate payment of such sums. At least one court has ruled that even where a creditor had a right to setoff, if the creditor proceeded in violation of section 362 the right to setoff can be voided as a sanction. In re Dartmouth House Nursing Home, Inc. (Bkrtcy.D.C.Mass.1982) 24 B.R. 256. While this court will not impose such a harsh sanction on the Millars, it will award the Trustee reasonable attorneys' fees as a sanction pursuant to section 362(h). Counsel for the Trustee shall prepare and submit an appropriate form of judgment in accordance with this opinion, which counsel for the Millars shall approve as to form. If the parties cannot agree to the proper amount due to the estate, a further hearing shall be held on September 4, 1987, at 9:00 A.M. at Santa Rosa, at which time the court will hear evidence and set the amount.

Dated: August 9, 1987

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ALAN JAROSLOVSKY

U.S. BANKRUPTCY JUDGE
